No. 93 1611 APR 12 1994

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IN THE

Supreme Court of the United States

October Term, 1993

CHRISTINE M. WHITMAN, Individually, and as Executrix of the Estate of DAVID WHITMAN, Deceased, and as Parent and Natural Guardian of JASON R. WHITMAN, an Infant over the age of 14 years, KENNETH T. WHITMAN, an Infant over the age of 14 years, and LUCAS G. WHITMAN, an Infant under the age of 14 years,

Petitioners,

against

DAVID DONOGHUE, Individually and in his capacity as Commissioner of Public Works for the County of Broome, New York; C. DAVID WEST, Individually and in his capacity as Deputy Commissioner of Public Works, Highway Division for the County of Broome; EARL CARD, Individually and in his capacity as General Highway Crew Supervisor for the County of Broome; and the COUNTY OF BROOME,

Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

JOSEPH FRANCIS CAWLEY, JR.
Counsel of Record
SMYK, SMYK & FAHRENZ
111-115 Court Street
Binghamton, NY 13901
(607) 723-8924
Counsel for Petitioner

THE REPORTER COMPANY, INC.—Walton, NY 13856—800-252-7181
Syracuse Office, University Building, Syracuse, NY 13202—315-426-1235
NYC Office—30 Vesey St., New York, NY 10007—212-732-6978—800-800-4264
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Question Presented

Where a municipality, acting under color of state law, affirmatively and intentionally creates a dangerous condition and that condition results in the loss of life to an individual, is the municipality's conduct actionable as a constitutional violation under 42 U.S.C. §1983?

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OCTOBER TERM, 1993.

CHRISTINE M. WHITMAN, Individually, and as Executrix of the Estate of DAVID WHITMAN, Deceased; and as Parent and Natural Guardian of JASON R. WHITMAN, an Infant over the age of 14 years, KENNETH T. WHITMAN, an Infant over the age of 14 years, and LUCAS G. WHITMAN, an Infant under the age of 14 years,

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Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

PETITION FOR A WRIT OF CERTIORARI

The Petitioners respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

Opinions Below

The Opinion of the Court of Appeals (App. A, Infra 1A-6A) is a Summary Order and Not Reported in the Federal Reporters. The Oral Opinion of the District Court (App. C, Infra 9A-17A) is unreported.

Jurisdiction

The Court of Appeals entered its judgment on January 20, 1994 (App. A, Infra 1A-6A). The jurisdiction of this Court is invoked under 28 U.S.C. §1254(1).

Statutory Provision Involved

42 U.S.C. 1983, provides in relevant part that:

> "Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory . . . subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress."

Statement

On October 9, 1991, David Whitman was an employee of the Broome County Department of Public Works Highway Division. On that day, pursuant to the direction of his employers, David Whitman was attempting to clear debris from the area in and around a culvert located under Old Newark Valley Road in the Town of Maine. To do this he was operating a County-owned and maintained bulldozer. The bulldozer which he was operating did not have affixed to it the Rollover Protection Structure (hereafter "ROPS") required by Federal and State Law (Joint Appendix, hereinafter J.A. p. 35). The plaintiffs have alleged and for purposes of the dismissal motion defendants have admitted that the ROPS had been intentionally removed from the bulldozer by or at the direction of the individual defendants four months earlier and placed in storage. These defendants were supervisory officials of the County of Broome and had been vested with the authority to establish and implement policies, practices and procedures for the operation of equipment within the Highway Division (J.A. p. 34). Defendants have conceded that each of the named defendants were aware, prior to the date of decedent's death, that the ROPS had been removed and that the bulldozer was being operated without that device, in contravention to the express requirements of the Federal (OSHA) and State (Department of Labor) regulations (J.A. p. 39).

In the course of performing his duties, David Whitman entered the mouth of the culvert and was crushed between the bulldozer and the top of the culvert, sustaining fatal injuries. Defendants concur that the accident and resulting injuries could not have occurred had the protective cage been affixed to the bulldozer (J.A. p. 38).

Petitioners' complaint was brought under 42 U.S.C. 1983 and 1988 alleging that the County's policy, practice and

custom of removing protective devices from equipment resulted in the deprivation of decedent's Constitutional rights to personal security and life, and the rights of his wife and children to familial association with him. Thereafter, the respondents moved for an order of dismissal of the complaint pursuant to Federal Rules of Civil Procedure 12(b)(6). The Hon. Thomas J. McAvoy, United States District Court granted Respondent's motion (App. B, C, p. 7A-17A). The United States Court of Appeals for the Second Circuit affirmed the lower Courts dismissal (App. A, Infra, 1A-6A) relying in large part on *Collins v. City of Harker Heights, Texas*, 112 S.Ct. 1061, 117 L.Ed. 2d 261 (1992).

In so doing the Second Circuit rejected petitioners' contention that the municipalities *affirmative creation of a dangerous* condition, when that condition causes death or injury, distinguished the instant case from *Collins, supra.*

Reasons for Granting the Petition

In dismissing plaintiffs' Complaint both the District Court and the Court of Appeals for the Second Circuit relied heavily upon the Supreme Court's ruling in *Collins v. City of Harker Heights, Texas*, 112 S.Ct. 1061, 117 L.Ed. 2d 261, (App. A, C, p. 4A-6A, p. 9A-17A).

In *Collins, supra*, Justice Stevens narrowed the issues stating "the question presented is whether Section 1 of the Civil Rights Act of 1871, 42 U.S.C. §1983, provides a remedy for a municipal employee who is fatally injured in the course of his employment because the City customarily *failed to train or warn its employees* about known hazards in the workplace." (Emphasis added.) *Collins, supra*, at p. 1064. A fair reading of the Petitioner's

Complaint in *Collins* did "not charge the City with a *willful violation* of Collins' rights." *Collins* at 1068-1069, *supra* (emphasis added).

In the instant case, the District Court and the Second Circuit Court of Appeals reliance upon *Collins* is both erroneous and misplaced.

In the instant action, the Petitioner clearly alleges in her complaint that the respondent's affirmatively created a dangerous condition, as opposed to alleging that the defendants simply deprived the decedent of a constitutional right by failing to provide a reasonably safe work environment.

Holdings in the Ninth Circuit (*L.W. v. Grubbs*, 974 F.2d 119 and *Wood v. Ostrander*, 879 F.2d 583), Eleventh Circuit (*Cornelius v. Town of Highland Lake, Alabama*, 800 F.2d 348), the Sixth Circuit (*Nishiyama v. Dickson County Tennessee*, 814 F.2d 277) and the Seventh Circuit (*White v. Rochford*, 592 F.2d 381) provide that where a municipality affirmatively creates a dangerous condition which results in the death or injury to a third person, that the municipality is responsible under 42 U.S.C. 1983. The Second Circuit's ruling in the instant case conflicts with the circuits listed above.

The Second Circuit ruling, in effect precludes a municipal employee from seeking redress under 42 U.S.C. 1983 for the unlawful deprivation of life, security and familial association under color of State law. Clearly this is inconsistent with the plain language of that section, and plaintiffs do not believe that it was intended that municipal

employees be exempted from recovery thereunder. In the interest of justice and the protection of basic constitutional rights for all persons without regard to employment status, the plaintiffs respectfully pray for this Court's consideration of the question presented herein. There continues to be conflicting decisions concerning these issues in various circuits and the need for guidance from this Court is acute. Moreover, the decision below is erroneous and the issue that it addresses is important, not only to municipal employees throughout this country, but also to provide municipalities guidance and accountability for their conduct.

I.

The Second Circuit Court of Appeals Interpretation of 42 U.S.C. 1983 is Erroneous and Conflicts With Decisions of the Sixth, Seventh, Ninth and Eleventh Circuits Which Concluded that the Affirmative Creation of a Dangerous Condition by a Municipality Under Color of State Authority Which Results in Injury of Death to a Third Person is Actionable Under 42 U.S.C. 1983.

On a motion to dismiss a Complaint pursuant to Fed. R. Civ. P. 12(b)(6), the Court is required to accept the plaintiff's allegations as true. See *United States v. Gaubert,* 111 S.Ct. 1267, 1276, 113 L.Ed 2d 335, (1991). The Complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to relief." *Conley v. Gibson,* 355 U.S. 41, 45-46, 78 S.Ct. 99, 102, 2 L.Ed 2d 80 (1957).

In the instant case, the plaintiff's Complaint was dismissed by the Federal District Court (App. B, C, p. 7A-17A). The dismissal was later affirmed by the Second Circuit Court of Appeals. (App. A, p. 1A-6A).

In dismissing the plaintiff's Complaint both the District Court and the Court of Appeals for the Second Circuit relied heavily upon the Supreme Court's ruling in *Collins v. City of Harker Heights, Texas,* 112 S.Ct. 1061, 117 L.Ed 2d 261 (1992) wherein the Court held that the failure to furnish a safe place to work does not rise to the level of a constitutional violation under 42 U.S.C. § 1983. (App. A, C, p. 1A-6A, p. 9A-17A)

The Complaint in this action clearly alleges that the defendant officials knowingly, intentionally, and in reckless disregard and deliberate indifference to David Whitman's safety and well-being, *caused* the condition which resulted in his death. More particularly, the Complaint alleges that said officials removed or caused to be removed from the subject bulldozer the protective cage (ROPS) mandated by Federal and State law, and thereafter directed Mr. Whitman to use the dozer to perform work in and about a low clearance concrete culvert. It is claimed that it was readily foreseeable that, in the absence of the protective cage, such work would necessarily place him at high risk of injury or death by reason of the likelihood of contact between his exposed body and the top of the culvert, a risk which the ROPS was specifically designed to protect against. It is further alleged that the individual defendants were those person(s) whom the defendant County had vested with authority to make and establish policies pertaining to the use and operation of heavy equipment in the Highway Division, and that, as such policymakers, they had in fact established (and the County had adopted) a policy and custom within such department of removing mandated protective devices and operating without them. In short, unlike the plaintiff in *Collins v. City of Harker Heights, supra,* the plaintiff herein is not claiming a mere "failure to furnish a safe place to work". Rather, the claim is that the defendants

knowingly and with reckless and deliberate disregard for Mr. Whitman's safety, affirmatively created a danger to him which would not otherwise have existed, and which in fact resulted in his injuries and death.

In affirming the District Court's dismissal of this action, the Second Circuit concluded that this case is indistinguishable from *Collins, supra.* The Court stated that:

> "[T]he appellant here has cast her claims in terms of a municipal policy that involved a willful, reckless disregard for her husband's life. Nevertheless, her complaint reduces to a claim that the defendants owed Whitman a duty to provide a workplace free from unreasonable hazards." (App. A, p. 4A-5A).

Petitioners strongly disagree. The claim here is that the defendants owed a duty not to *create* unreasonable hazards in an otherwise safe workplace.

The Second Circuit went on to state:

> "Appellant contends that this case is distinguishable from *Collins* because the defendants here affirmatively created a dangerous condition. We reject this contention. Whether the conduct involved is affirmative or not, it must be 'sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified a misuse of [authority] as to transcend the bounds of ordinary tort law.' *McClary,* 786 F.2d at 88 (quoting *Shillingford v. Holmes,* 634 F.2d 263, 266 [5th Cir. 1981])." (App. A, p. 5A).

Even ignoring the general principal that a determination of "sufficiency" such as that suggested would be one for resolution by the trier of fact, it is submitted that this opinion directly conflicts with the decisions of the U.S. Court of Appeal for the Sixth, Seventh, Ninth and Eleventh Circuits, each of whom have held that a municipality may be held accountable under §1983 where it has created the danger resulting in injury or where it has itself placed the injured party at risk.

A careful review of the *Collins* decision expressly exempts from its holding the situation where a municipal employer *creates* the dangerous condition. The Supreme Court noted that the complaint in *Collins* alleged only that the City had violated the decedent's constitutional rights by failing to train its employees about the dangers of working in sewers, failing to provide safety equipment at job sites, and failing to provide adequate safety warnings. (*Collins* at 1064.) As the Court stated:

> "It is important . . . to focus on the allegations in the complaint to determine how petitioner described the constitutional right at stake and what the city allegedly did to deprive her husband of that right.
>
> A fair reading of petitioner's complaint does not charge the city with a willful violation of Collins' rights . . . [S]he does not even allege that his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured." *Collins, supra* pp. 1068-1069.

The factors which were at the crux of the *Collins* ruling are the very ones which distinguish it from the instant case. In the case at bar, the plaintiff does not claim that the defendants failed to correct an already existing condition, or failed to properly train a person or warn him with respect to such conditions. In fact, they are not claiming a "failure" at all, but rather that the defendants affirmatively *created* the dangerous condition which resulted in David Whitman's death, by intentionally and willfully removing the protective structure from the bulldozer in question. Then, with deliberate indifference and in reckless disregard of the obvious risks to his safety directly arising from their removal of the ROPS, they directed him to engage in a task which would expose him to the very danger which the ROPS was designed to prevent. It is the defendants' affirmative act in first creating the dangerous condition, and then knowingly directing the decedent to perform a task which was certain to expose him to grave danger, which is at the heart of plaintiff's claim. Unlike cases such as *Collins, supra,* and *DeShaney v. Winnebago County Department of Social Services,* 109 S.Ct. 998, 489 U.S. 189, 103 L.Ed. 2d 249 (1989) where "Petitioners concede the State played no part in creating [the danger]" (*supra* at 1004) this is not a situation where the defendants simply failed to protect the plaintiff from a potential risk. In the instant case, the defendants actually created the risk and caused the decedent to be vulnerable to it. Unlike *DeShaney, supra,* where the defendant "placed [plaintiff] in no worse position than that in which he would have been had it not acted at all" (*Id.* at 1006), David Whitman would have been in *no* danger and would be alive and well today had the defendants not removed the ROPS from his bulldozer.

In direct contravention to the Second Circuit's decision in this case are the holdings of four other circuits.

In *Nishiyama v. Dickson County Tennessee, et al.*, (814 F2d 277) (6th Cir. 1987) the plaintiffs alleged, *inter alia*, that the Sheriff's policy and practice of entrusting fully equipped official patrol cars to inmates deprived their daughter Cathy of her life without due process of law. The Sixth Circuit Court of Appeals held in that case, *inter alia*, that the *reckless indifference to the risk* posed by the actions of the Sheriff and Deputy Sheriff in permitting the inmate to have the use of an official patrol car was sufficient to establish a violation of substantive due process under Section 1983. (Emphasis added.) The Sheriff's policy of allowing an inmate use of an official patrol car effectively created the condition complained of.

In *White v. Rochford*, 592 F2d 381 (7th Cir., 1979), the Chicago Police Department was held liable under §1983 for damages suffered by three children abandoned on the side of a dark busy highway when the police arrested their caretaker. In reversing the District Court's granting of a motion to dismiss the Complaint, the Seventh Circuit stated "it is clearly established that although officials may not be held liable for simple negligence, they may be held liable for 'gross negligence' or '*reckless disregard*' for the safety of others." (*Id.* at 385) (emphasis added). There too, the defendants had created the danger which served as the basis for the complaint.

In *L.W. v. Grubbs*, 974 F2d 119, (9th Cir., 1992), the plaintiff was a nurse employed by the State of Oregon at a custodial institution for young male offenders. She brought a 1983 action against her employer for violating her consti-

tutional right to personal security by requiring her to work with a violent sex offender who ultimately assaulted her. The *Grubbs* Court found that "the actions of the Defendants created the danger to which L.W. fell victim" (*Id.* at 121) and that "because Defendants affirmatively created the dangerous situation which resulted in L.W.'s assault, the district court erred in dismissing L.W.'s claim" (*Id.* at 122).

In *L.W. v. Grubbs, supra,* as here, the defendants relied upon *Collins v. City of Harker Heights, supra* for the proposition that a dangerous working condition could not supply the basis for 1983 liability against a municipal employer. The Ninth Circuit in *L.W. v. Grubbs, supra* responded by noting that:

> "In rejecting Collins' claim, the Court held that Collins had not alleged affirmative culpable acts by the city. According to the Court, Collins' complaint alleged merely that "the city deprived him of life and liberty by failing to provide a reasonably safe work environment." (Citation omitted.) The Court pointed out that Collins had *not* alleged that "his supervisor instructed him to go into the sewer when the supervisor knew or should have known that there was a significant risk that he would be injured."
>
> "Under *Collins,* we cannot dismiss L.W.'s claim against Defendants merely because she was an employee supervised by them. Moreover, the shortcomings identified by the Court in *Collins'* complaint do not exist in L.W.'s complaint. Unlike Collins, L.W. *alleges that the Defendants took affirmative steps* to place her at significant risk, and that they knew of the risks. Contrary to Defendants arguments, *Collins*

actually supports L.W.'s claim." (Emphasis added.) *L.W. v. Grubbs, supra* at 122.

Similarly, the Eleventh Circuit in *Cornelius v. Town of Highland Lake,* 880 F2d 348 (11th Circuit, 1989), held that the plaintiff had stated a viable 1983 cause of action where the plaintiff (the Town Clerk) was required, as a condition of her employment, to work with prison inmates participating in a Community Work Program, two of whom ultimately abducted her. The Court held:

> "In this case, the defendants did indeed create the dangerous situation . . . by establishing the work squad and assigning the inmates to work around the town hall. Moreover, the defendants increased Mrs. Cornelius' vulnerability to harm by regularly exposing her to the work squad inmates by virtue of her position as Town Clerk." *Id.* at 356.

In its Decision, the Cornelius Court quoted *Bowers v. DeVito,* 686 F2d 616 (Seventh Cir. 1982), which recognized that:

> "[I]f the State *puts* a man in a position of danger and then fails to protect him, it will not be heard to say that its role was merely passive; it is as much an active tort-feasor as if it had thrown him into a snake pit.". (*Cornelius, supra* at 354.)

Finally, in affirming the District Court's dismissal of the instant action, the Second Circuit held:

> "Moreover, this case does not fit within the line of cases cited by appellant in which the municipality was in a special relationship with the plaintiff *involving physical control.*" (Emphasis added.) (App. A, p. 5A.)

This statement misinterprets both the case at bar and the referenced cases. As a general rule, members of the public have no constitutional right to sue State employees who fail to protect them against harm inflicted by third parties. *L.W. v. Grubbs, supra* at 121. There are *two* exceptions to this general rule: (1) The special relationship exception; and (2) the "danger creation" exception. Although some cases have blended the two exceptions (see, e.g., *Ketchum v. County of Alameda,* 811 F2d 1243 at 1247) it is clear that *both* need not be satisfied. *L.W. v. Grubbs, supra.*

The distinction between the two is important. The "danger creation" basis for a claim necessarily involves affirmative conduct on the part of the municipality in placing the plaintiff at risk. (See *Wood v. Ostrander,* 879 F2d 583, 588-590 [9th Cir. 1989].) But custody is not a prerequisite to the "danger creation" basis for 1983 liability, *L.W. v. Grubbs, supra* at 122.

In *Wood v. Ostrander, supra,* a police officer stopped the car in which the plaintiff was riding. He arrested and removed the driver, impounded the car, and left the plaintiff stranded in a high crime area. She was subsequently raped. In that case, even though the plaintiff had not been in custody, the claim was allowed to go forward because the jury could have found that the defendant officer had affirmatively created the particular danger that exposed her to third-party violence.

The cases cited by petitioner (*Nishiyama v. Dickson County Tennessee, supra, Wood v. Ostrander, supra, L.W. v. Grubbs, supra,* and *Cornelius v. Town of Highland Lake, supra*) as well as the case at bar, are readily distinguishable from the allegations by the plaintiffs in *Collins, supra,* and *McClary v. O'Hare,* 786 F2d 83 (2nd Cir., 1986). In the line of cases cited by petitioner, the defendant municipality affirmatively created a dangerous condition. Conversely, in *Collins* and *McClary,* the municipal defendants simply were claimed to have failed to correct a dangerous condition. This distinction was referenced in *Bowers v. DeVito* when the Court stated "[T]he defendants in this case did not place Miss Bowers in a place or position of danger; they simply failed adequately to protect her . . ." *Bowers, supra* at 618.

In the case at bar, the municipality, under color of state authority, took a safe piece of equipment and an otherwise non-hazardous task, and affirmatively *created* an ultra-hazardous and dangerous condition by removing the protective cage designed to prevent the operator's body from coming into contact with overhead structures. As a direct result of the removal of that cage, David Whitman was killed. It is undisputed that had the ROPS been in place, David Whitman would not have been injured.

II.

The Question Presented is Important

This case involves the construction and interpretation of 42 U.S.C. 1983 as it relates to employees injured in the performance of their duties. The Second Circuit's ruling serves to preclude a municipal employee from seeking re-

dress under 42 U.S.C. 1983 for deprivation of life, security and familial association under color of State law. The allegations in the instant case clearly charge that the respondents knowingly, intentionally and in reckless disregard and deliberate indifference to David Whitman's safety and well-being, *caused* the condition which resulted in his death by removing or causing to be removed the ROPS and then directing the use of the dozer in the course of work which would expose him to the very risk of injury and death which the ROPS was designed to protect. The removal and use of this bulldozer without the rollover protective structure was clearly in violation of Federal (OSHA) and State (Department of Labor) regulations. As a result of the removal of this protection, Mr. Whitman was killed when he came into contact with an overhead structure. It is conceded that had the rollover protective structure remained in place, Mr. Whitman could not have been harmed.

To allow the Second Circuit's decision to remain standing, provides a municipality carte blanche to act towards its employees in virtually any manner it chooses. As in this case, the municipality would be free to remove the only protection which they provided to their employees, thereby reducing a non-hazardous, non-dangerous job into one which is ultra-hazardous. If the Second Circuit's decision is permitted to stand, it is tantamount to holding that, so long as by doing so it creates a "dangerous working condition", a municipal employer may do virtually whatever it pleases without regard to the safety of its workers, and it will not be held liable for the egregious consequences of its actions under Section 1983. It could, for example, direct a highway worker to pave a busy highway on a dark night, then *take away* protective equipment *previously provided* to the employee, such as his hard hat, orange vest, barricades, warn-

ing signs, flashing lights, and flagmen, thereby rendering what would have been a non-hazardous task extremely dangerous and likely to result in bodily harm or death and yet, when the employee is predictably injured or killed, the government employer would still not be held to have violated his constitutional rights. Surely this is not in keeping with the intent of Section 1983 which is to provide a remedy for all persons (including municipal employees) who suffer deprivation of their constitutional rights by reason of the unlawful acts and conduct of State officials. Unquestionably, if the defendant County were to have affirmatively created a dangerous condition which resulted in the likelihood of injury or death to a private citizen, it would be held liable under Section 1983. A municipal employee deserves no less protection than such private citizen.

In the interest of justice and the protection of basic constitutional rights for all persons without regard to employment status, the petitioners respectfully pray for this Court's consideration of the questions presented herein. There continues to be conflicting decisions concerning the issues in various circuits and the need for guidance from this Court is acute. Moreover, the decision below is erroneous and the issue that it addresses is important, not only to municipal employees throughout this country, but also to municipalities to provide guidance and accountability for their conduct.

Conclusion

The petition for writ of certiorari should be granted.

Respectfully submitted,

JOSEPH FRANCIS CAWLEY, JR., ESQ.
Counsel of Record
SMYK, SMYK & FAHRENZ
111-115 Court Street
Binghamton, New York 13901
(607) 723-8924
Counsel for Petitioner

APPENDIX A—Order and Decision of the United States Court of Appeals, Second Circuit, Decided January 20, 1994.

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

At a stated Term of the United States Court of Appeals for the Second Circuit, held at the United States Courthouse in the City of New York, on the 20th day of January, one thousand nine hundred and ninety-four.

PRESENT:

HON. ROGER J. MINER,
HON. J. DANIEL MAHONEY,
Circuit Judges,
HON. JANE A. RESTANI,*
Judge.

CHRISTINE M. WHITMAN, Individually and as Executrix of the Estate of DAVID L. WHITMAN, Deceased; and as Parent and Natural Guardian of JASON R. WHITMAN, an Infant over the age of 14 years, KENNETH T. WHITMAN, an Infant over the age of 14 years, and LUCAS G. WHITMAN, an Infant under the age of 14 years,

Plaintiff-Appellant,

v.

DAVID DONOGHUE, Individually and in his capacity as Commissioner of Public Works for the County of Broome, New York; C. DAVID WEST, Individually and in his capacity as Deputy Commissioner of Public Works, Highway Division,

*Hon. Jane A. Restani of the United States Court of International Trade, sitting by designation.

for the County of Broome; EARL CARD, Individually and in his capacity as General Highway Crew Supervisor for the County of Broome and THE COUNTY OF BROOME,

Defendants-Appellants.

ORDER 93-7932

UPON CONSIDERATION of this appeal from a judgment of the United States District Court for the Northern District of New York, it is hereby

ORDERED, ADJUDGED, AND DECREED that the judgment of said District Court be and it hereby is AFFIRMED.

Plaintiff-appellant Christine Whitman appeals from an August 30, 1993 judgment of the United States District Court for the Northern District of New York (McAvoy, C.J.), dismissing her complaint for damages under 42 U.S.C. § 1983 arising out of the accidental death of her decedent/husband David Whitman, the district court having found that she failed to state a claim for deprivation of due process.

Mrs. Whitman brought this action on her own behalf, as executrix of the estate of Mr. Whitman and as parent and guardian of her children, Jason, Kenneth and Lucas Whitman. The facts concerning Mr. Whitman's death are largely undisputed. At the time of his death, Whitman was employed by the Broome County Department of Public Works ("DPW"). On October 9, 1991, he was operating a John Deere bulldozer owned and operated by the DPW. His task was to clear debris from a riverbed near a metal culvert. He drove into the culvert and was pinned between the bulldozer and the top of the culvert, resulting in his death.

In June of 1991, approximately four months prior to the accident, a large metal Rollover Protective Structure ("ROPS") was removed from the subject bulldozer in violation of OSHA and New York Department of Labor regulations. Appellant alleges that the absence of the ROPS was the cause of the fatal accident. Whitman was aware of the removal of the ROPS and was the only operator of the bulldozer from June of 1991 until his death. The complaint includes allegations that the individual defendants were aware or should have been aware of the removal of the ROPS, that they had the authority to establish policies with regard to the operation of heavy motor equipment in the Highway Division of the DPW, and that they established a policy of removing the ROPS from the subject bulldozer and from other equipment in "reckless and knowing disregard for the safety" of Highway Division employees. This policy, according to the allegations in the complaint, "was willful, knowing, and in reckless disregard and deliberate indifference to the constitutional rights of those employees." In the complaint, appellant also claims that the County violated Whitman's constitutional rights by establishing, through the individual defendants, a policy of operating the bulldozer and other unspecified heavy machinery without the ROPS. The complaint also includes allegations that the appellant, Mrs. Whitman, was deprived of her liberty interest in being married to Whitman and that her children were deprived of their liberty interest in their relationship with their father.

On a motion to dismiss pursuant to Fed. R. Civ. P. 12(b)6, the court is required to accept the plaintiff's allegations as true, *see United States v. Gaubert,* 111 S. Ct. 1267, 1276 (1991), and the complaint may not be dismissed "unless it appears beyond doubt that the plaintiff can prove no set of facts in support of his claim which would entitle him to

relief." *Conley v. Gibson*, 355 U.S. 41, 45-46 (1957). In this case, we are satisfied that the complaint should be dismissed.

This case is governed by the Supreme Court's recent decision in *Collins v. City of Harker Heights*, 112 S. Ct. 1061 (1992). In that case, a municipal sewer worker died of asphyxia when he entered a manhole to unstop a sewer line. His widow sued under section 1983, alleging that the city violated her husband's constitutional rights under the Due Process Clause of the Fourteenth Amendment to be free from unreasonable risks of bodily harm by following a custom of not training its employees about the dangers of working in sewers, not providing safety equipment at job sites and not providing safety warnings. The complaint also alleged that the city had knowledge of prior accidents and had systematically and intentionally failed to provide proper equipment and training required by Texas statute. The Court held that the appellant had not stated a claim for a deprivation of due process, concluding that the substantive component of the Due Process Clause did not impose a duty on governmental employers to provide its employees with a safe working environment. *Id.* at 1069. In so holding, the Court stressed that the Due Process Clause should not be interpreted to supplant traditional state tort law and noted that it is "not a guarantee against incorrect or ill-advised personnel decisions." *Id.* (quoting *Bishop v. Wood*, 426 U.S. 342, 350 [1976]). The Court also noted that the conduct involved was not "arbitrary, or conscience shocking, in a constitutional sense." *Id.* at 1070; *see Southeastern Pa. Transp. Auth. v. Undercofler*, 990 F.2d 789, 792-93 (3d Cir. 1993).

This case is conceptually indistinguishable from *Collins*. As in *Collins*, the appellant here has cast her claims in terms of a municipal policy that involved a willful, reckless disre-

gard for her husband's life. Nevertheless, her complaint reduces to a claim that the defendants owed Whitman a duty to provide a workplace free from unreasonable hazards. Moreover, the decisions made by the defendants in this case cannot be said to be "arbitrary, or conscience shocking, in a constitutional sense." As appellant readily admits, the ROPS was removed to allow the bulldozer to move into tight places. This clearly is not an unconstitutional basis for decision; as was the case in *Collins*, the decision merely was "ill advised." 112 S. Ct. at 1070. Moreover, we do not perceive the conduct in this case to be any more "conscience shocking" than that alleged in *Collins*. *See also McClary v. O'Hare*, 786 F.2d 83 (2d Cir. 1986) (finding no deprivation of due process where municipal worker was killed in an accident involving a crane that municipal defendants allegedly failed to maintain in a safe condition and allowed to be operated by an unlicensed worker).

Appellant contends that this case is distinguishable from *Collins* because the defendants here affirmatively created a dangerous condition. We reject this contention. Whether the conduct involved is affirmative or not, it must be " 'sufficiently severe, sufficiently disproportionate to the need presented and so deliberate and unjustified a misuse of [authority] as to transcend the bounds of ordinary tort law.' " *McClary*, 786 F.2d at 88 (quoting *Shillingford v. Holmes*, 634 F.2d 263, 266 [5th Cir. 1981]). The conduct here simply does not rise to the level of a constitutional violation. Moreover, this case does not fit within the line of cases cited by appellant in which the municipality was in a special relationship with the plaintiff involving physical control. As with the decedent in *McClary*, Whitman "could hardly be said to have been under the County's direct physical control." *Id.* at 89. Finally, given the absence of a

violation of Whitman's constitutional rights, it is clear that his widow and children have suffered no wrong of constitutional dimension.

s/ROGER J. MINER
HON. ROGER J. MINER,

s/J. DANIEL MAHONEY,
HON. J. DANIEL MAHONEY,
Circuit Judges

s/J. A. RESTANI
HON. JANE A. RESTANI
Judge.

N. B. THIS SUMMARY ORDER WILL NOT BE PUBLISHED IN THE FEDERAL REPORTER AND SHOULD NOT BE CITED OR OTHERWISE RELIED UPON IN UNRELATED CASES BEFORE THIS OR ANY OTHER COURT.

United States Court of Appeals
Second Circuit
Filed: Jan. 20, 1994
George Lange III, Clerk

APPENDIX B—Order of the United States District Court, N.D., New York dated August 27, 1993.

UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

At a motion term of the United States District Court for the Northern District of New York held at the Federal Courthouse in the City of Binghamton on the 27th day of August, 1993.

PRESENT:

HON. THOMAS J. MCAVOY
United States District Court Judge

CHRISTINE M. WHITMAN, Individually and as Executrix of the Estate of DAVID WHITMAN, Deceased; CHRISTINE M. WHITMAN, as Parent and Natural Guardian of JASON R. WHITMAN, KENNETH T. WHITMAN, and LUCAS G. WHITMAN, Infants,

Plaintiffs,

vs.

DAVID DONOGHUE, Individually and in his capacity as Commissioner of Public Works for the County of Broome, New York; C. DAVID WEST, Individually and in his capacity as Deputy Commissioner of Public Works, Highway Division; EARL CARD, Individually and in his capacity as General Highway Crew Supervisor for the County of Broome; and the COUNTY OF BROOME,

Defendants.

ORDER
Civil Action No.
93-CV-0024

Defendants herein having duly moved for an Order of dismissal of the Complaint herein pursuant to Federal Rules of Civil Procedure 12(b)(6) by Notice of Motion dated August 2, 1993 and upon hearing Hickey, Sheehan & Gates, P.C., Gregory A. Gates, Esq., in support of said application and Smyk, Smyk & Fahrenz, Joseph Cawley, Esq. of counsel in opposition thereto and after due deliberation having been had herein it is

ORDERED that the motion of the defendants for a dismissal of the Complaint herein pursuant to Federal Rules of Civil Procedure 12(b)(6) and the same hereby is granted and it is further

ORDERED that the Complaint herein be and the same hereby is dismissed.

s/HON. THOMAS J. MCAVOY
HON. THOMAS J. MCAVOY
UNITED STATES DISTRICT COURT
JUDGE

Dated: Binghamton, New York
August 27, 1993

U.S. District Court
N.D. of N.Y.
Original Filed: Aug. 27, 1993
George A. Ray, Clerk
Binghamton

APPENDIX C—Transcript of Proceedings Held August 27, 1993 for the United States District Court, N.D., New York ——.

(1) UNITED STATES DISTRICT COURT
NORTHERN DISTRICT OF NEW YORK

CHRISTINE M. WHITMAN, *ET AL,*

Plaintiffs,

versus

DAVID DONOGHUE, *ET AL,*

Defendants.

93-CV-24

TRANSCRIPT OF PROCEEDINGS held in and for the United States District Court, Northern District of New York, at the Federal Building and Courthouse, 15 Henry Street, Binghamton, New York 13901, on Friday, August 27, 1993, before the HON. THOMAS J. MCAVOY, United States District Court Judge.

(2) APPEARANCES:

For the Plaintiffs:
SMYK, SMYK & FAHRENZ
By: JOSEPH F. CAWLEY, ESQ.
111-115 Court Street
Binghamton, New York 13901

For the Defendants:
HICKEY, SHEEHAN & GATES
By: GREGORY A. GATES, ESQ.
160-162 Hawley Street
Binghamton, New York 13902

(3) The Court: All right. Now under 12(b)(6), the issue here is whether the complaint by Mrs. Whitman and her three sons is sufficient or whether it's failed to state a valid claim.

On a dismissal motion for failure to state a claim, the general rule is that the allegations in the plaintiff's complaint are deemed to be true and must be liberally construed in the light most favorable to the plaintiff. That's *Scheuer vs Rhodes,* 416 US 232; *Dahlberg vs Becker,* 748 Fed 2d 85, cert. denied 470 US 1084. Although the Court does not have to accept mere conclusions of law, the Court should accept the plaintiffs' description of the occurrence in addition to any conclusions that could reasonably be drawn therefrom. *Murray vs. City of Milford,* 380 Fed 2d 468. The complaint should not be dismissed unless it appears beyond a reasonable doubt that the plaintiff cannot in any way establish a set of facts to sustain a claim which would permit relief. *Hughes vs Rowe,* 449 US 5; *Bass versus Jackson,* 790 Fed 2d 260.

Now, Mrs. Whitman and her son base their action on 42 US Code 1983 which empowers the Court to grant relief when a plaintiff's federally protected rights have been breached by state or local officials acting under color of state law. To adequately support such a claim the plaintiff must assert that the alleged action was undertaken by a person acting under color of state law and that such conduct has deprived her of a right (4) granted under the US Constitution or federal law. *Paratt vs Taylor,* 451 US 527. It was reversed in part on other grounds. *Gomez vs Toledo,* 446 US 635 and in the case you gentlemen cited, *Collins versus City of Harker Heights,* which is 112 Supreme Court 1061. The Supreme Court delineated this same test in regard to 1983 actions asserted against a municipality, stating the plaintiff must allege in her complaint she has suffered a constitutional violation and also that the municipality is responsible for that violation.

Now, the plaintiffs' claims in this case rest entirely on the due process clause of the Fourteenth Amendment, specifically the substantive due process aspect of that clause. Substantive aspect of the due process clause protects an individual's life, property and liberty interests by barring certain government actions regardless of the fairness of the procedures used to implement them. That's *Daniels versus Williams,* 474 US 327.

Now, the complaint alleges the decedent, Mr. Whitman, was deprived of his constitutionally protected right to life because county officials created and affirmatively acted under a policy or custom in which a safety device, meant to protect the life of county employees, was removed from the bulldozer involved in the accident and that county officials knew or should have known of the removal of the ROPS from the bulldozer which placed Mr. Whitman in significant danger of (5) losing his life while operating that vehicle.

In the *Collins* case just cited, a similar case, an employee of a city sanitation department entered a manhole to clean a sewer line and was asphyxiated. His widow brought a 1983 suit asserting Collins had a constitional right to be free from unreasonable risks of harm to his body, mind and emotions and a constitutional right to be protected from the City of Harker Heights' custom and policy of deliberate indifference towards the safety of its employees. She claimed that the city violated these rights by observing a policy or custom of not training municipal workers on the dangers of working in manholes, not providing safety equipment and not providing warnings of unsafe conditions.

The Court found that the petitioner failed to state a valid claim under Section 1983 because such claim was not supported by the substantive element of the due process clause. That's Collins at 1069. The Court arrived at this conclusion by reasoning that fairly analyzed, her claim advances a theory that the Federal Constitution imposes a duty on the city to provide its employees with minimal levels of safety and security in the workplace, and that neither the text nor the history of the due process clause supports petitioner's claim that the governmental employer's duty to provide its employees with a safe working environment is a substantive component of the due process clause. Collins again at 1069. (6) Regardless of the exact wording, the plaintiff in this case essentially asserts the same right as the plaintiff in *Collins*. Although the complaint states that it was decedent's right to life that is protected by the due process clause, it is in principle saying the decedent has a right to safe working conditions under the due process clause.

Plaintiff in this case seeks to distinguish the *Collins* decision by arguing that the ruling applies only to a failure to correct existing unsafe working conditions. Whereas in this case the decedent's injuries were caused by the affirm-

ative act of removing the rollover protective structure from the bulldozer which was attached to the vehicle specifically to avoid injury and loss of life of the type that happened to Mr. Whitman. Plaintiff distinguishes the current case as an affirmative act which has legal significance distinct from the failure to act which occurred in *Collins*.

Essentially this really is a semantic exercise by the plaintiff designed to distract from the real fact that whether the county policy was a result of an affirmative act or omission, the affirmative act only created an unsafe working condition. It's already been decided in *Collins* that the substantive component of the due process clause does not impose a duty on employers to furnish employees with safe working conditions. That's *Collins* at 1068. It's really immaterial whether the policy created an unsafe condition or simply allowed (7) an existing peril to continue. As *Collins* fairly analyzed, the plaintiffs' claim in this case also advances a theory that the Constitution requires employers to furnish a safe workplace, a proposition not supported by the due process clause.

Further precedent in conflict with the validity of the plaintiffs 1983 cause of action is found in *McClary vs O'Hare*. 786 Fed 2d 83. The state employee was killed in an accident on the job. The estate claimed that a New York State Highway Department official, Richard O'Hare, intentionally failed to follow safety requirements, thus creating unsafe working conditions which deprived the plaintiff of his right to life. However, the plaintiff did not show that O'Hare intended to abuse his power as a state official to harm Roger McClary. Whatever abuses O'Hare committed were abuses of authority that he held as an employer. Identical actions could have been carried out by a private employer for the same reasons and with the same regrettable consequences. That's the *McClary* case at page 89. The

court clearly stated that we do not think that improper actions taken by employers violate an employees substantive due process rights simply because that employer's a government official. This is simply not a case in which a government official, because of his unique position as such, was able to impose a loss on an individual. *McClary* at page 89 again.

Here the situation really is no different. (8) County officials abused the authority that they held as employers not as government officials. In allowing the safety violations, the county officials acted in their capacity as employers not in a capacity giving them special governmental powers that are not held by private employers. Thus, this case is actually a state tort action, not a proper 1983 claim. As stated in *McClary,* under these circumstances the substantive component and due process clause does not provide a remedy to a public employee that would not be available to a private employee subject to identical conduct by his employer. Mr. Whitman's estate and family cannot rightfully receive relief for the improper decision of the county and its officials simply because the decedent was employed by a county entity. The county did not cause a violation of constitutional rights, thus no valid 1983 claim has been asserted by plaintiff. *Washington versus District of Columbia,* 802 Fed 2d 1478. A failure to fix unsafe job conditions may breach a duty under tort law, however such tort law rights and duties are quite distinct from those secured by the Constitution or federal law. We found no cases holding that an employee's right to a safe workplace is secured by anything other than the state law of tort. *Washington* case. Plaintiffs also assert that they have been denied their constitutionally protected liberty interest in having a familial relationship with the decedent. They claim that this liberty interest is protected by the substantive element of the due (9) process clause.

Further, they allege that these rights have been violated by county officials acting under a policy or custom to allow operation of heavy machinery without the rollover protective device. If the defendants cannot be found to have violated the decedent's rights, they certainly cannot be found to have violated the plaintiff's rights. If the employee himself has no substantive due process right to a safe work place, then his family cannot validly claim to have constitutionally protected interests arising from the decedent's right to a safe workplace either.

The Supreme Court has recognized that government entities owe a duty of care to those who have already been deprived of their liberty interest, such as prisoners, pretrial detainees and patients in mental institutions. However, the Court does not accept the idea that a municipality deprives the liberty interest of a municipal employee who voluntarily chooses to work for it. That's *Collins* at 1070. A government employee cannot be said to be under the county's direct physical control and where the government's control is lessened, so is its duty and its failings are less likely to be of constitutional proportions cognizable under Section 1983. That's *McClary* at page 88 and 89. Moreover, where a member of the public is harmed as a result of a government official's failure to act, a constitutional violation is generally not found. *McClary* at 88.

(10) Under this reasoning, the failure to provide safe working conditions for the decedent does not rise to the level of a constitutional violation of the right of Mrs. Whitman and her children who are members of the public. Violation of any right they have to a familial relationship to the decedent is not a liberty interest protected by the substantive element of the due process clause. Thus, the 1983 claim fails in this case because the plaintiffs have failed to assert that a constitutionally protected liberty interest has been violated.

Now, as to the county's liability. Because the plaintiffs have not alleged a valid 1983 cause of action against the county officials no municipal liability can be assessed against the county itself. Because no constitutional tort has been properly alleged, the policy or custom causing a constitutional tort cannot be shown either. Any misfeasance by the county officials amounts to state tort liability for which the county could only be found liable on a *respondeat superior* basis. However, *respondeat superior* liability is not recognized as a proper foundation for Section 1983 liability because the language of Section 1983 cannot be easily read to impose liability vicariously on governing bodies solely on the basis of the existence of an employer/employee relationship with a tortfeasor. That's *Monell versus DSS*, 98 Supreme Court 2018. Simply stated, a local government may not be sued under Section 1983 for an injury inflicted solely by its employees or agents. (11) *Monell* at page 2037. So, the plaintiffs have not asserted a valid 1983 cause of action against the county.

So, in sum, the plaintiffs have failed to allege an adequate claim for relief under the statute. Although there is no question in the Court's mind that the defendants acted under color of state law, the plaintiffs have failed to show that the conduct of the defendants deprived them of rights secured by the US Constitution or federal law. So, the motion's granted. Defendant will submit an order.

Mr. Gates: One was submitted with our papers, your Honor. A proposed order was submitted with our papers.

The Court: Thanks, Mr. Cawley.

Mr. Cawley: Thanks, Judge.

(12) REPORTER'S CERTIFICATION

I, VICKY A. THELEMAN, RPR, United States Court Reporter in and for the United States District Court, Northern District of New York, do hereby certify that I attended at the time and place set forth in the heading hereof; that I did make a stenographic record of the proceedings had in this matter and cause the same to be transcribed; that the foregoing is a true and correct copy of the same and the whole thereof.

s/VICKY A. THELEMAN, RPR
VICKY A. THELEMAN, RPR
United States Court Reporter
U.S. District Court - NDNY

Dated: September 16, 1993